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February 21, 1995

EX PARTE

Mr. William F. Caton, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.C.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: MM Docket No. 92-260
Cable Television Home Wiring Regulations

Dear Mr. Caton:

Adelphia Communications Corporation ("Adelphia"), by its attorneys, hereby submits the following comments as a part of what it understands is the Commission's on-going proceedings in MM Docket No. 92-260.

Adelphia understands that the Commission presently is reconsidering its cable television home wiring regulations in a manner that could drastically alter these regulations so as to (1) apply them to wiring far outside the individual units in multiple unit dwellings ("MDUs"), and (2) require cable operators to give up ownership of the internal distribution infrastructure in MDUs immediately upon installation.

Within the last ten days, a federal district court in Virginia and a state appellate court in Florida have issued decisions that Adelphia believes make clear that these sorts of changes to the cable home wiring regulations would very likely have the worst sort of anti-competitive effects. Adelphia also has concerns that these sorts of changes to the cable home wiring regulations are beyond Congress' intent and the FCC's authority, and that they will abrogate existing contracts

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and inappropriately recast arms' length negotiations long since completed. As the recent court decisions show, however, the contemplated changes will most likely be a spur to the use by property owners and alternative providers of cable television services of exclusive contracts; the creation of economic distortions in the marketplace as service providers rush to make access payments to property owners; and the elimination of choice for residents of MDUs as to their service provider. As the court decisions also show, state laws already address these issues and the existence of full and fair competition.

1. It would be beyond the FCC's statutory authority, and at odds with Congressional intent, for the FCC to either (1) alter the demarcation point, or (2) require cable operators to give up ownership of internal distribution infrastructures upon installation.

As a preliminary matter, Section 624(i) of the 1992 Cable Act directs the Commission to

[P]rescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.¹

To the extent that the FCC is reconsidering its regulations so as to alter the demarcation point and apply its regulations to wiring far outside the individual units in MDUs, the FCC goes beyond that part of the statute limiting the FCC's authority to cable "within the premises" of a "subscriber." Clearly, where the residents of an MDU have individual service contracts with a cable operator, each resident is a "subscriber," and each residential unit constitutes the subscriber's "premises." Thus, any other wiring, for example, wiring running through common areas, is not covered by the statute and is beyond FCC authority.

Likewise, to the extent that the FCC is reconsidering its regulations so as to require operators to give up ownership of the internal distribution infrastructure in MDUs upon installation, the FCC is going beyond that part of the statute that limits the FCC's authority to situations "after" a "subscriber" "terminates service." Indeed, the statute by its express language prevents the FCC from effecting some automatic transfer of ownership before a subscriber may have initiated, let alone terminated, service.

Moreover, to the extent that the FCC is considering these sorts of changes, it also is going far beyond relevant Congressional intent. Specifically, Congress stated that the statutory home wiring provision is limited to "the cable installed within the interior premises of a subscriber's

¹ 47 U.S.C. §544(i) (emphasis added).

dwelling unit."² The legislative history also provides that Congress did not intend the statute to apply to "cable facilities inside the subscriber's home prior to termination of service."³

2. The proposed changes retroactively affect arms' length transactions and abrogate existing contracts.

In addition, the contemplated changes seem to ignore the fact that property owners and cable operators in many cases have entered into contracts regarding the provision of service to MDUs that specifically address issues of ownership of inside wiring, including provision and installation of wiring. Such provisions have been specifically negotiated by the parties, and the parties have acted in accordance with, and in reliance upon, their terms and conditions.

The changes under consideration by the FCC would abrogate these existing contracts. This fact, as well as the fact that the changes would exceed the FCC's statutory authority, casts a dubious light on the proposed changes.

3. The proposed changes likely would have anti-competitive results, and they address areas already addressed by state laws.

Perhaps the most fundamental fact is that, as shown by decisions in the last ten days by a federal district court in Virginia and a state appellate court in Florida, the contemplated changes to the cable home wiring regulations would very likely have the worst sort of anti-competitive effects. Specifically, the contemplated changes would likely spur property owners and alternative providers of cable television services to enter into agreements under which the parties seek to eliminate competition in exchange for money payments or other remuneration.

Both cases demonstrate, in fact, that cable competitors and property owners already are attempting to eliminate competition through such agreements. Specifically, on February 10, 1995, a federal district court in Charlottesville, Virginia awarded a cable operator summary judgement on the operator's claims that a local MMDS operator and several local landlords had wrongfully interfered with the operator's right to offer cable service; converted the operator's cable equipment and facilities; tortiously interfered with the operator's business expectancy; and

² H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992).

³ Id.

exchanged illegal kickbacks in violation of the Virginia Landlord-Tenant Act.⁴ In awarding the cable operator summary judgment, the court specifically found that several Charlottesville area landlords, after many years of allowing the local cable operator to offer its services to the landlords' tenants, entered into exclusive service agreements with an MMDS operator. Under these agreements, the landlords ejected the cable operator from their premises, attempted to seize the cable equipment and facilities on their premises--which the cable operator had provided and/or installed itself--and attempted to turn the equipment and facilities over for the exclusive use of the MMDS operator. In exchange, the MMDS operator paid the landlords a kickback from its gross revenues obtained from serving the landlords' tenants. The cable operator had expressed repeatedly its willingness to compete with the MMDS operator; however, the MMDS operator steadfastly refused to compete in any way.

The district court found that the property owners had granted licenses to the cable operator to provide service to the tenants, and that these licenses had been wrongfully breached. The district court also found, with regard to all but one of the properties involved in the case, that the defendants had wrongfully converted the cable equipment and facilities, which were the property of the cable operator. The court also found that the defendants had tortiously interfered with the operator's business expectancy and had exchanged illegal kickbacks in violation of Virginia statutory law. The district court also decided that the case would go to trial on the operator's claim that the defendants had entered into both common law and statutory conspiracies to injure the operator.

The magnitude of the problem is illustrated by the fact that the district court's decision was its second award to the cable operator in six months, who recovered almost \$300,000 in damages from the MMDS operator and other Charlottesville landlords in August, 1994. The operator was forced to file the second lawsuit when, during the middle of the first lawsuit and before it had gone to trial, the MMDS operator persisted in entering into new agreements with area landlords under which the landlords evicted the operator, turned the operator's cable systems over to the MMDS operator, and the MMDS operator kicked back gross revenues to the landlords.

Almost simultaneously, a Florida state appellate court on February 15, 1995 affirmed a trial court decision on a virtually identical claim that an MMDS operator in Florida and a condominium association had wrongfully interfered with the local cable operator's easements

⁴ See Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corp., No. 93-0073-C (W.D.Va. Feb. 16, 1995). The cable operator previously had been awarded a preliminary injunction in this case, which was appealed to, and affirmed by, the U.S. Court of Appeals for the Fourth Circuit. Multi-Channel TV Cable Company v. Charlottesville Quality Cable, 22 F.3d 546 (4th Cir. 1994).

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rights; converted the cable operator's cable equipment and facilities; and tortiously interfered with the cable operator's business expectancy.⁵ Again, the case sprang from the execution and performance of an exclusive service contract between the MMDS operator and, this time, a condominium association under which the condominium association attempted to eject the cable operator and to turn over the cable operator's property. Again, the cable operator expressed its willingness to compete and the MMDS operator steadfastly refused. Again, a trial court (in September, 1993) determined that the defendants acted wrongfully. Last week's appellate court decision affirmed the trial court's determinations in their entirety.

These court decisions illustrate two significant points. First, there exist powerful incentives for certain parties to distort the market place. These distortions, if left unchecked, lead to the proliferation of exclusive service contracts and the misallocation of resources to access payments and the elimination of competition. Residents of MDUs are denied, therefore, what otherwise might be the ability to choose between multiple video service providers. The proposed changes to the cable television home wiring regulations would give a green light to parties to pursue the types of agreements at issue in these decisions and distort the market place in a manner that is clearly anti-competitive. Indeed, the proposed changes would likely work as an incentive, for parties to enter into these agreements.

The recent case decisions also show that state law already works to address the existence of competition. In both cases, the courts found that state property, contract and tort law--both common law and statutory law--addressed issues involving the right of video service providers to have access to property and to the ownership of equipment and facilities.

Adelphia requests that the Commission consider, in light of these recent federal and state court decisions and the potential for similar factual situations to arise across the country, the likelihood that its proposed changes in the cable television home wiring regulations will serve to diminish and/or eliminate competition. Along with the fact that the proposed changes are beyond

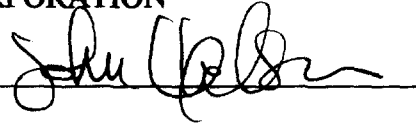
⁵ Southeast Florida Cable Inc. v. Islandia I Condominium Association, Inc., No. 93-3316 (Fla. Dist. Ct. App. Feb. 15, 1995).

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the Commission's authority, and will abrogate existing contracts, they make clear that the proposed changes should not be enacted.

Respectfully submitted,

ADELPHIA COMMUNICATIONS
CORPORATION

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